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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Defining Certain Incumbent LEC	)	
Affiliates as Successors, Assigns,	)	CC Docket No. 98-39
or Comparable Carriers Under	)	
Section 251(h) of the	)	
Communications Act	)	
	)	
	)	

OPPOSITION OF GTE SERVICE CORPORATION AND GTE COMMUNICATIONS CORPORATION

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SUMMARY

The CompTel Petition has no basis in law or policy and is a transparent effort to stifle competition in the local exchange and bundled services markets. The Petitioners are free to offer individual customer contracts, to bundle services in response to consumer demand, and to price in accordance with market pressures. ILECs, in contrast, remain heavily regulated and may not provide interexchange and CMRS services except through a separate affiliate.

Given this disparity, GTE Corporation and other holding companies have established separate, independent, non-dominant subsidiaries, which relate to and interconnect with all ILECs on the same basis as any competing carrier. These independent competitive subsidiaries greatly benefit consumers and enhance competition. For example, the independent subsidiary can offer desirable packages of local, long distance, and wireless services (as anticipated by the Commission) without regard to franchise boundaries, seamlessly provide advanced services to customers throughout the nation, and experiment with new services and delivery platforms outside the ILEC's traditional offering of local exchange services (and without risk to the ILEC's customers). Notably, these independent subsidiaries raise no legitimate competitive concerns because they are treated the same by their affiliated ILEC as any other competitor, and the relationship between the ILEC and the independent competitive subsidiary is closely regulated by the FCC and state PUCs.

Against this background, CompTel's Petition is meritless and should be denied for four compelling reasons:

There is no legal or factual basis for finding that independent CLECs are "successors or assigns." Under well-settled corporate law principles, a company is not a successor to another company unless it "has become invested with the rights and assumed the burdens of the first corporation" through a process of amalgamation, consolidation, or duly authorized legal succession. Undoubtedly recognizing that independent CLECs do not fit this definition, Petitioners ignore the generally accepted meaning of "successor" and instead seize on the labor law doctrine of "successorship." That body of law, however, is inapplicable outside the context of the National Labor Relations Act. (Petitioners do not even try to argue that independent CLECs are "assigns," and there is no basis under corporate law for finding such a relationship.) In addition, the factors that Petitioners rely on in claiming that independent competitive subsidiaries are "successors" are irrelevant under the applicable corporate law, in some cases wholly at odds with reality, and in others are expressly permitted under FCC precedent.

The Petition is essentially an untimely petition for reconsideration of decision in Docket No. 96-149. In Docket No. 96-149, the Commission held that (1) ILEC holding companies may establish competitive subsidiaries to provide competitive local and interexchange services, (2) those subsidiaries must comply with modified *Fifth Report and Order* separation requirements but can use the same or a similar trade name as the ILEC subsidiary and can share personnel and other resources, and (3) those subsidiaries should be regulated as non-dominant. The Petition effectively asks the Commission to reverse the second and third of these determinations, and is therefore

an untimely petition for reconsideration. Moreover, the Petitioners have entirely failed to provide any legal or factual basis for changing this established policy.

Independent competitive subsidiaries of the same corporate parent as an existing ILEC are clearly not "comparable" to the existing ILEC under Section 251(h)(2). Petitioners' alternative request for relief – that the Commission commence a rulemaking to declare independent competitive subsidiaries to be "comparable" to their affiliated ILECs – must be denied as well. None of the three statutory criteria for comparability is satisfied. First, no competitive subsidiary of an ILEC's corporate parent occupies a position in the market even remotely comparable to the position held by the ILEC. Second, no such subsidiary has come close to "substantially replacing" the ILEC. Petitioners' argument that the replacement analysis must focus solely on the customers served by the subsidiary is illogical; under this theory, any CLEC – whether or not affiliated with an ILEC – would be deemed a "comparable" carrier. Third, the public interest would not be served by subjecting independent competitive affiliates to regulation as ILECs. Doing so would remove a positive competitive force from local exchange and bundled services markets.

There is no reason to grant the Petition. Even if independent competitive subsidiaries could be considered "successors or assigns," which they plainly cannot, there is no demonstrated need for Commission action. Existing statutory and regulatory safeguards – including Section 251 and 252 requirements imposed on the ILECs (particularly the non-discrimination standard and Section 252(i) most favored nation requirement), FCC and state affiliate transaction and cost accounting rules, the separate affiliate mandate of 47 C.F.R. § 64.1903, and price cap regulation – assure

that independent competitive subsidiaries will be unable to gain any unfair advantage in the marketplace. Given the existence of these stringent requirements, Petitioners' unsupported and speculative allegations that individual ILECs may be evading the Act provide no basis for the imposition of highly burdensome restrictions on hundreds of competitors.

For the reasons summarized above and fully discussed herein, the Commission should promptly deny the CompTel Petition. By doing so, the agency can assure that vibrant competition in the local exchange and bundled services market continues to develop free from unwarranted and intrusive government regulation.

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OPPOSITION OF GTE

GTE Service Corporation and its affiliate GTE Communications Corporation[1] (collectively, "GTE") hereby submit their Opposition to the Petition filed by Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association ("Petitioners") in the above-captioned docket.[2] Petitioners have requested that the Commission issue a declaratory ruling holding: (1) that an incumbent local exchange carrier ("ILEC") affiliate that operates under the same or a similar brand name as the ILEC and provides wireline local exchange or exchange access service within the ILEC's region will be considered a

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[1] GTE Communications Corporation is an independent subsidiary established by GTE Corporation to provide competitive local exchange, interexchange, and other services. It is affiliated with the various GTE telephone operating companies by virtue of a common ultimate parent.

[2] Petition for Declaratory Ruling Or, In the Alternative, For Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act, CC Docket No. 98-39 (filed March

"successor or assign" of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act ("Act"), and consequently the affiliate itself will be subject to the obligations imposed on ILECs under Section 251(c)[3]; and (2) that such an affiliate will be treated as a "dominant carrier" for the provision of interstate service. In the alternative, Petitioners have requested that the Commission propose a rule establishing a rebuttable presumption that an ILEC affiliate that provides wireline local exchange or exchange access service within the ILEC's service area under the same or a similar brand name is a "comparable" carrier under Section 251(h)(2).[4] GTE urges the Commission to reject both of Petitioners' requests.

I. INTRODUCTION: NON-DOMINANT AFFILIATES OF ILECS ENHANCE COMPETITION AND BENEFIT CONSUMERS.

The Petition is a transparent effort to prevent competitive carriers which simply share the same corporate parent as an ILEC from competing effectively in meeting customer demand for "one-stop shopping." The Petitioners are free to offer individual customer contracts, to price in accordance with market pressures, and to bundle services in response to consumer demand, all without having to offer mandatory wholesale discounts or unbundled access to their networks. ILECs, in contrast, remain saddled with burdensome rate and service regulation, along with unbundling, discounted resale, and other obligations imposed under Section 251(c). Moreover,

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3 47 U.S.C. § 252(c) & (h)(1)(B)(ii).

4 47 U.S.C. § 251(h)(2).

ILECs may not provide interexchange and CMRS services except through a separate affiliate.

GTE Corporation and certain Regional Bell Holding Companies have therefore established separate, independent, non-dominant subsidiaries, which transact business with their ILEC affiliates and any other ILEC on the same basis as any other competing carrier. The existence of these independent companies benefits consumers and enhances competition in several respects:

- As anticipated by the Commission, the independent competitive subsidiary can offer desirable packages of local, long distance, wireless, and other services.
- The independent competitive subsidiary can seamlessly provide advanced services to customers with premises both inside and outside of the ILEC subsidiary's service areas.
- The independent competitive subsidiary has the flexibility to offer customers different bundles or varieties of services that may better suit the needs and demands of specific customers or market segments.
- The independent competitive subsidiary may experiment with new services, new service delivery platforms, and new marketing methods outside the ILEC's offering of traditional local exchange services; for example the independent CLEC is able to take market risks which the ILEC subsidiary might not undertake.

Grant of CompTel's Petition would deprive consumers of the lower rates and greater innovation stimulated by competition from these competitive subsidiaries, and would render GTE and other similarly situated companies unable to compete effectively in the bundled services market against such integrated carriers as AT&T, MCI, and Sprint. Given ever increasing consumer demand for one-stop shopping, this disparity would gravely disadvantage an entire industry segment.

Importantly, the existence of these independent competitive subsidiaries raises no risks to competition because they are treated the same by the ILEC subsidiary as any other competitor. Indeed, the relationship between the ILEC subsidiary and independent competitive subsidiary is closely regulated by Sections 251 and 252, must comply with the FCC's separations and affiliate transaction requirements,[5] and is also subject to scrutiny by state Public Utility Commissions ("PUCs").

Against this background, GTE demonstrates below that the Petition should be denied for four compelling reasons:

- Petitioners rely on an untenable interpretation of the "successor or assign" language in Section 251(h)(1) (Section II, *infra*);
- Petitioners essentially seek untimely reconsideration of FCC decisions that clearly recognize the right of ILEC holding companies to establish subsidiaries that can provide competitive local exchange and interexchange services on a non-dominant basis, without being considered "successors" to the ILEC or being subjected to the onerous additional obligations sought by Petitioners (Section III, *infra*);
- Petitioners fail to demonstrate that independent competitive subsidiaries are "comparable" to the ILEC subsidiary of their parent holding company under Section 252(h)(2) (Section IV, *infra*); and
- The relief sought by Petitioners is entirely unwarranted in any event (Section V, *infra*).

The Commission should thus reject the Petitioners' transparent efforts to insulate themselves from competition by independent competitive subsidiaries which happen to be corporate siblings of existing ILECs .

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5 *See* 47 C.F.R. §§ 64.1903, 32.27.

II. THERE IS NO LEGAL OR FACTUAL BASIS FOR FINDING THAT INDEPENDENT COMPETITIVE SUBSIDIARIES ARE "SUCCESSORS OR ASSIGNS" TO THE EXISTING ILEC SUBSIDIARY OF THEIR CORPORATE PARENT.

Petitioners argue that the Commission should find independent competitive subsidiaries affiliated with an existing ILEC subsidiary of their corporate parent to be "successors" or "assigns" of the ILEC, and that doing so would be "consistent with the common understanding of th[ose] terms . . . ."[6] Petitioners' claim is simply wrong, and should be rejected.

The term "successor" has long had an established meaning in the corporate law context, but not the one upon which Petitioners rely. "Successor" means, "in the case of a corporation, another corporation which, by a process of amalgamation, consolidation, or duly authorized legal succession, has become invested with the rights and has assumed the burdens of the first corporation." *See, e.g., In re New York, S. & W.R. Co.*, 109 F.2d 988, 994 (3rd Cir. 1940) (quotation marks and citation omitted); *Atchison Casting Corp. v. Dofasco, Inc.*, 889 F. Supp. 1445 (D. Kan. 1995) (the "generally accepted meaning" of "successor" is "another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.") (citing Black's Law Dictionary at 1431, 96th ed. 1990)). Essentially, then, a "successor" corporation is one that, through some process of "legal succession," stands in the shoes of its predecessor as a matter of law.

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[6] Petition at 9.

Petitioners do not even suggest that independent competitive subsidiaries of an ILEC's corporate parent fall within this "generally accepted meaning" of the term "successor." No "amalgamation, consolidation, or other legal succession" was involved in the formation of these independent subsidiaries, and they are not "invested with the rights" or saddled with the "burdens" of ILECS. To the contrary, the fundamental reason a corporate parent forms a separate and independent subsidiary is specifically so that this independent subsidiary will *neither* be able to take advantage of the unique market position of its existing ILEC subsidiary, *nor* face the heightened regulatory burdens (such as a proscription on bundling local and long distance services) imposed on its existing ILEC subsidiary.

Petitioners attempt to evade the generally accepted meaning of "successor" as it relates to corporations by seizing on the specialized "doctrine of successorship" that has developed in the context of the National Labor Relations Act ("NLRA"). Under the NLRA, the question arises whether a new employer has an obligation to bargain with the union representing the predecessor's employees as a result of "succeeding" to the predecessor's business.[7] As the cases cited by Petitioners indicate, the answer turns on whether there is "substantial continuity" between the two enterprises: "whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same

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[7] *See, e.g., Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 29 (1987).

production process, produces the same products and basically has the same body of customers."[8]

In conducting this analysis, the emphasis is on whether "those employees who have been retained will understandably view their job situations as essentially unaltered,"[9] because if they do and "their legitimate expectations in continued representation by the union are thwarted, their dissatisfaction may lead to labor unrest."[10] Clearly, then, the NLRA cases cited by Petitioners do not apply in the present context.[11] The "doctrine of successorship" is strictly a labor law construct, shaped by considerations relevant to that area of the law, but fundamentally inapplicable here.[12]

Notably, Petitioners cite no cases whatsoever suggesting that affiliated competitors could properly be found to be ILEC "assigns," and their failure to do so is not surprising. It is well-established that "assignment" occurs "when there is a transfer

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8 *Id.* at 43.

9 *Id.* (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1987)).

10 *Fall River*, 482 U.S. at 43.

11 Given the unambiguous meaning of the statutory terms under the plainly relevant corporate law precedent, a Commission decision applying the inapplicable NLRA precedent would not be entitled to *Chevron* deference.

12 Moreover, even accepting the test for "successorship" set forth in Petitioners' NLRA cases, it is obvious that independent competitive subsidiaries would not qualify as "successors" to the existing ILEC subsidiary of their corporate parent. The "employees of [independent subsidiaries]" are *not* "doing the same jobs in the same working conditions under the same supervisors"; and the independent competitive subsidiaries do *not* "ha[ve] the same production process, produce[] the same products and basically ha[ve] the same body of customers" as the existing ILECs with which they are simply affiliated through the same corporate parent.

of some identifiable property, claim or right" from the assignor to the assign.[13] Moreover, "assignment operates to transfer to the assign[] all of the rights, title or interest of the assignor in the thing assigned."[14] Petitioners do not (and indeed cannot) claim that any of the alleged "transfers" of resources[15] from ILECs to the independent competitive subsidiaries of their corporate parents rise to the level of an "assignment" of such resources, and the independent subsidiaries therefore are clearly not "assigns."[16]

Finally, as a factual matter, the Petitioners have offered no basis for suggesting that there is anything other than a clearly permissible relationship between the ILEC and competitive subsidiaries of the parent holding company. They cite to three factors

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[13] *See Newcombe v. Sundara*, 654 N.E.2d 530, 534 (Ill. App. 1995); *Johnson v. Schick*, 882 P.2d 1059, 1061 (Okla. 1994) ("assignment is an expression of intention by one that his rights shall pass to and be owned by another") (internal quotation marks and citation omitted).

[14] *Newcombe*, 654 N.E.2d at 534; *accord Myers v. Citicorp Mortgage, Inc.*, 878 F. Supp. 1553, 1557 (M.D. Ala. 1995) ("assignment is defined as the transfer . . . to another of the whole of any property, real or personal") (internal quotation marks and citation omitted); *Krohn v. Gardner*, 533 N.W.2d 95, 98 (Neb. 1995) ("assignment is a transfer vesting in the assign[] all of the assignor's rights in the property which is the subject of the assignment"); *Haag v. Pollack*, 836 P.2d 551, 556 (Idaho Ct. App. 1992) ("assignment is a transfer of all of one's interest in property")

[15] *See, e.g.*, Petition at 5.

[16] Petitioners claims thus contrast starkly with the scenario envisioned by the Commission in the *Non-Accounting Safeguards Order*—that BOCs might attempt to evade the application of Section 272 by completely "transferring local exchange and exchange access facilities" to affiliates. *See* 11 FCC Rcd at 22050, ¶ 301. Such a total transfer presumably would constitute an "assignment," and the Commission's decision to treat such affiliates as "assigns" under Section 3(4) of the Act would therefore be justified in those circumstances.

that supposedly render the competitive subsidiary "indistinguishable" from the ILEC, but none of these creates any kind of successor or assign relationship. First, they note that the competitive affiliate may use the same name or trademarks as the ILEC without compensating the ratepayers of the ILEC for the use of goodwill.[17] In GTE's case, however, GTE Corporation, not the ILECs, own the GTE trademark, and GTE's telephone ratepayers did not pay for the creation of that trademark. Nor is there any trademark asset on the GTE ILECs' books, so no "transfer" can possibly have occurred.[18] Second, the Petitioners complain that the competitive affiliate is capitalized and funded entirely by the holding company and will have access to borrowing power that is "secured in substantial party by the assets and expected future earnings" of the ILEC.[19] This, too, is inaccurate. Debt issued by GTE's ILECs encumbers the assets of those companies and comes with debt covenants that the ILECs must maintain. It would violate those covenants for funds raised by the telephone operating companies to find their way to GTE's competitive subsidiary.[20] Third, the Petitioners note that

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[17] Petition at 5. The Petition cites BellSouth as an example, but further states that "such conduct is typical of the ILECs that are creating so-called CLEC affiliate companies." *Id.* at 6. It is worth pointing out that it is the parent holding company, not the ILEC, that is creating the competitive subsidiary.

[18] In any event, as discussed below, the Commission already has held that a competitive affiliate may use the same trade name as the ILEC without indicating that such use would either create a successor relationship or merit dominant treatment of the competitive affiliate. In addition, GTE believes that a bar on the use of the trademark could constitute an unconstitutional taking.

[19] Petition at 5.

[20] In addition, the Commission has no jurisdiction over the issuance of equity securities by the holding company or the use of funds generated by the holding company.

some former employees of the ILEC may become employed by the competitive subsidiary. GTE Communications Corporation has in fact hired former employees of various GTE affiliates, as well as MCI, AT&T, and Sprint. A rule prohibiting the competitive affiliate from hiring the best qualified employees, even if they come from the ILEC, could run afoul of labor laws. In short, the Petitioners have offered no legal or factual basis for their conclusion that independent competitive affiliates are "successors or assigns" to the ILEC under Section 251(h).

III. THE PETITION MUST BE REJECTED AS AN UNTIMELY PETITION FOR RECONSIDERATION OF DECISIONS IN DOCKET NO. 96-149.

A. The Commission Already Has Decided that Competitive Affiliates of ILECs Are Not "Successors or Assigns" and Should Not Be Subject to Hyper-Separation.

Petitioners' argument under Section 251(h)(1) not only contradicts established judicial interpretations of "successor or assign," but is also fundamentally inconsistent with the Commission's determinations regarding competitive affiliates of ILECs assigns in Docket No. 96-149.[21] There, the Commission considered the "concern that a BOC might attempt to circumvent the section 272 safeguards by transferring local exchange and exchange access facilities and capabilities to one of its affiliates."[22] To address this problem, the Commission decided that "if a BOC transfers to an affiliated entity ownership of [such] network elements . . . [the Commission] will deem such entity to be an 'assign' of the BOC under section 3(4) of the Act" and so subject to the section 272

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[21] 11 FCC Rcd at 22054-55, ¶¶ 309-13.

requirements.[23] At the same time, however, the Commission emphasized that "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services."[24] The *Non-Accounting Safeguards Order* thus recognized the general rule that BOC affiliates offering local exchange services are not successors or assigns, subject to a narrow exception designed to prevent BOCs from circumventing the Section 272 safeguards. The same general rule applies, of course, to affiliates of non-BOC LECs.

In addition, the Commission flatly rejected arguments that competitive affiliates of ILECs should be subject to the sort of hyper-separation sought by Petitioners.[25] And the Commission likewise stated that the "*Fifth Report and Order* requirements do not preclude an independent LEC from taking advantage of its good will by providing interexchange services under the same or a similar name [as the telephone operating company subsidiary]."[26] The 96-149 decisions, therefore, have already determined that holding companies of ILECs should be able to establish competitive subsidiaries that provide interexchange and competitive exchange services using the same or a similar

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(...Continued)

22 *Id.* at 22050, ¶ 301.

23 *Id.*

24 *Id.* at 22055, ¶ 312.

25 *Regulatory Treatment Order* at ¶ 165.

26 *Id.* at ¶ 183.

name to the ILEC and sharing employees – without the competitive subsidiary being considered a "successor" to the ILEC or subjected to onerous regulation.

Petitioners' Section 251(h)(1) argument would turn these decisions on their head. Under Petitioners' approach, all BOC affiliates and other ILEC affiliates "providing wireline local exchange or exchange access service in the ILEC's region under the same or similar brand names" would be "successors or assigns" under Section 251(h)(1).[27] Indeed, these independent competitive subsidiaries would be "successors or assigns" not merely in the exceptional case where they assume ownership of local exchange facilities or capabilities from the ILEC, but in essentially every case, subject to possible exceptions only where the competitive subsidiaries operate under an entirely "dissimilar" name. The Commission should not countenance what is, in effect, merely an untimely petition for reconsideration of that Order.

B. Subjecting Competitive Subsidiaries to Dominant Carrier Regulation would Violate the *Regulatory Treatment Order*.

Even if it were consistent with earlier court and Commission decisions to impose ILEC status on independent subsidiaries of an ILEC's corporate parent, subjecting such companies to dominant carrier regulation as requested by Petitioners would still conflict with Commission precedent. As the Commission recently observed in its *Regulatory Treatment Order*, affiliates "should be classified as dominant carriers in the provision of . . . services only if the affiliates have the ability to raise prices of those services by

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[27] *See, e.g.*, Petition at 11.

restricting their own output of those services."[28] In making that determination, "the Commission has previously focused on certain well-established market features, including market share, supply and demand substitutability, the cost structure, size or resources of the firm, and control of bottleneck facilities."[29]

Applying these criteria to the issue at hand, independent competitive subsidiaries clearly have no ability to raise price by restricting output in any relevant market for interstate access services or other jurisdictionally interstate services. First, the independent company's market share in the provision of such services is small; indeed, its initial market share is simply zero. Similarly, regarding substitutability, access customers could clearly turn to other sources of interstate access services—including the ILEC itself or unaffiliated competitors – if the independent competitive subsidiary "restricts" its output.

The Commission's recent observations regarding the "cost structure, size, and resources of BOC interLATA affiliates" apply equally to independent competitive subsidiaries' provision of local services; the Commission found that these factors "are not likely to enable [ILEC affiliates] to raise prices above the competitive level" for

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[28] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, FCC 97-142 (released Apr. 18, 1997) ("*Regulatory Treatment Order*"), at 49, ¶ 85; and 92, ¶ 156.

[29] *Id.* at 54, ¶ 93 (citing *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Notice of Proposed Rulemaking in CC Docket No. 96-149 (released July 18, 1996), at 64-65, ¶ 133); *see also Regulatory Treatment Order* at 92, ¶ 157.

particular services.[30] Finally, the Commission's discussion of "control of bottleneck facilities" in the context of an independent competitive subsidiary's provision of interexchange services also applies here.[31] Although the Commission found that independent LECs could potentially use their bottleneck facilities to harm their affiliates' competitors through misallocation of costs, discrimination, or price squeezing, the Commission concluded that the safeguards set forth in the *Fifth Competitive Carrier Report and Order* would be sufficient to guard against such anti-competitive conduct.[32]

Notably, Petitioners do not suggest that the factors relevant to the dominant carrier analysis outlined in the Commission's *Regulatory Treatment Order* support dominant carrier treatment of independent subsidiaries here. Rather, Petitioners attempt to distinguish the *Regulatory Treatment Order* on the ground that it applied only to provision of *long distance* service by ILEC affiliates, and therefore has "no relevance to the treatment of these *local* affiliates' in-region interstate services, such as interstate access."[33] However, Petitioners read the *Regulatory Treatment Order* too narrowly and ignore other Commission precedent plainly contemplating that the non-dominant affiliates of ILECs would be providing *competitive local* as well as long distance

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30 *Regulatory Treatment Order*, at 56, ¶ 97.

31 *Id.* at 92-96, ¶¶ 158-64.

32 *Id.* at 93-95, ¶¶ 159-63. *See also Access Reform Order* at ¶¶ 275-282 (concluding that, "although an incumbent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze, we have in place adequate safeguards against such conduct," referring to the *Fifth Competitive Carrier* separations requirements now contained in 47 C.F.R. § 64.1903.).

33 Petition at 12.

services. In this regard, the *Regulatory Treatment Order* expressly provides that, "in addition to taking exchange services by tariff, the [affiliate] may alternatively take unbundled network elements or exchange services for the provision of a telecommunications service" pursuant to a Section 252 interconnection agreement.[34] And the *Non-Accounting Safeguards Order* emphasized that "a BOC section 272 [long distance] affiliate is not precluded under section 272 from providing local exchange services" and may "obtain[] resold local exchange service pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3) ...."[35] The same, clearly, holds true for affiliates of independent telcos. Thus, the Commission already has recognized that ILECs' non-dominant long distance affiliates may provide competitive local services and obtain inputs for those services from the affiliated ILEC. Petitioners' claim must therefore be rejected.[36]

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[34] *Regulatory Treatment Order*, at ¶ 164.

[35] *Non-Accounting Safeguards Order* at ¶¶ 312, 313.

[36] It is important to emphasize that the *Regulatory Treatment Order* resolved the issue of whether ILEC affiliates should be treated as dominant carriers for the provision of long-distance services. In that context, the Commission determined that "applicable statutory and regulatory safeguards" are sufficient to guard against anti-competitive conduct. *Regulatory Treatment Order* at 60, ¶ 103.

IV. PETITIONERS' REQUEST FOR A RULEMAKING SHOULD BE REJECTED BECAUSE INDEPENDENT COMPETITIVE SUBSIDIARIES OF THE SAME CORPORATE PARENT AS AN EXISTING ILEC ARE CLEARLY NOT "COMPARABLE" TO THE EXISTING ILEC UNDER SECTION 251(h)(2).

As an alternative to declaratory relief under Section 251(h)(1), Petitioners request that the Commission initiate a proceeding under Section 251(h)(2) to establish a rule under which independent CLEC subsidiaries of an ILEC's corporate parent will be considered "comparable" carriers if they "provide[] local service in the same geographic area as the ILEC and if the ILEC has transferred anything of value, including brand names, financial resources, or human capital, to the affiliate."[37] Such a rule, however, would plainly be inconsistent with Section 251(h)(2) itself, and the proceeding that Petitioners request would therefore be a waste of Commission resources.[38]

Section 251(h)(2) provides that the Commission "may, by rule, provide for the treatment of a [LEC] (or class or category thereof) as an [ILEC]" when three specific criteria are satisfied:

> (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent exchange] carrier described in paragraph (1);

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[37] Petition at 13.

[38] Such a rule also would be directly inconsistent with 47 C.F.R. § 64.1903(b), which expressly permits the affiliate to be "staffed by personnel of its affiliated exchange companies, housed in existing offices of its affiliated exchange companies, and use its affiliated exchange companies' marketing and other services, subject to paragraph (a)(3) of this section."

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.[39]

None of these criteria is satisfied here.

First, it is clear that no competitive subsidiary of an ILEC's corporate parent currently "occupies a position in the market for telephone exchange service" remotely "comparable" to the position occupied by the ILECs themselves. The Commission wrote in its *Regulatory Treatment Order* that, "although the 1996 Act establishes a framework for . . . fostering local competition, . . . such competition is still in its infancy."[40] Since the release of that decision, competition in the local exchange market (particularly in the business segment) has grown rapidly. Nonetheless, no CLEC — whether or not affiliated with an ILEC — has yet to achieve an overall market position "comparable" to any ILEC.

Petitioners attempt to avoid this obvious fact by arguing that because "customer . . . perce[ptions]" of ILECs and the independent competitive subsidiaries of their corporate parents are allegedly comparable, their "position[s] in the market for telephone exchange service" must be comparable as well.[41] Petitioners provide no empirical support for this argument, and, more important, it appears illogical on its face.

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39 47 U.S.C. § 251(h)(2).

40 *Regulatory Treatment Order*, at 58, ¶ 100.

41 Petition at 14.

The manner in which customers "perceive" an ILEC's corporate sibling plainly has no effect on those companies' position in the exchange services market.

It is equally clear that no competitive subsidiary of an ILEC's corporate parent has come close to "substantially replac[ing] an incumbent local exchange carrier." Indeed, Petitioners do not really even argue that such an affiliate could satisfy the requirement of Section 251(h)(2)(B) as written; instead, Petitioners urge that the Commission should find it sufficient that the competitive subsidiary replace the existing ILEC subsidiary "*with respect to the customers it serves.*"[42] Again, however, Petitioners' argument is illogical. Due to the historical position of ILECs in the market for local exchange services, virtually *any* company providing local exchange services replaces an ILEC "with respect to the customers it serves." Therefore, to find that such a "replacement" satisfies Section(h)(2)(B) would be to read that requirement out of the statute entirely.

As further discussed below, the public interest, convenience, and necessity would not be served by subjecting independently operated competitive subsidiaries to the same regulation as ILECs. Instead, such regulation would serve only to stifle competition in the nascent competitive market for exchange access and services. Petitioners' request for rulemaking under Section 251(h)(2) should therefore be rejected.

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42 *Id.* (emphasis added).

V. THERE IS NO REASON FOR GRANTING THE PETITION EVEN IF THE COMMISSION HAD AUTHORITY TO DO SO.

Even assuming that any of the relief sought by the Petitioners complied with the statute, which it does not, Petitioners have failed to demonstrate a need for Commission action. Indeed, Petitioners could not possibly demonstrate such a need, because the statutory and regulatory safeguards already in place are sufficient to insure against anti-competitive conduct on the part of ILEC affiliates in the market for exchange access and services.

Section 251 and 252 requirements. Notwithstanding Petitioners' suggestions to the contrary,[43] there is no way that ILECs could evade their obligations under Section 251 simply because an independent competitive subsidiary of its corporate parent is providing local services. First, Section 251, by its terms, forbids discrimination between services provided by an ILEC to its affiliates and to unaffiliated parties.[44] Thus, any more favorable rate, term, or condition offered the independent competitive subsidiary of its corporate parent would have to be made available to all competing carriers.

Similarly, Section 252(i) expressly requires that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section . . . to any other requesting telecommunications

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[43] Petition at 3-7.

[44] *See, e.g.*, 47 U.S.C. § 251(c)(2)(D) (imposing on ILECs the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . on rates, terms, and conditions that are just, reasonably, and nondiscriminatory").